

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES GRAY and SCOTT HORTON,
individually and on behalf of others similarly
situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
corporation, and AMAZON.COM SERVICES
LLC, a Washington limited liability company

Defendants.

No. 2:22-cv-800-BJR

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs James Gray and Scott Horton (“Plaintiffs”) brought this putative class action against Defendants Amazon.com, Inc. and Amazon.com Services LLC (together, “Amazon” or “Defendants”), asserting various claims arising from Amazon’s alleged use of voice data collected through its Alexa digital assistant software for purposes of targeted advertising. Presently before the Court is Defendants’ motion to dismiss Plaintiffs’ Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 37. Having reviewed the pleadings, the record of the case, and the relevant legal authorities, the Court GRANTS the motion. The Court’s reasoning is set forth below.

II. BACKGROUND¹

A. Factual Background

1. Alexa

Amazon’s Alexa is a voice-activated digital assistant software that runs on various devices sold by Amazon – including the family of “Echo” smart speakers – and other companies with which Amazon partners. Compl. ¶¶ 15-17. Alexa-enabled devices, all of which contain a microphone, perform a wide range of functions that are prompted by users’ voiced commands and questions, such as turning on a television program, obtaining the day’s weather forecast, and making purchases from Amazon.com. *Id.* ¶¶ 18-19. To interact with Alexa, a user must first say the “wake word” – which is “Alexa” – before speaking aloud their inquiry or command (*e.g.*, “what is the weather in Seattle tomorrow?”). *Id.* ¶ 18. Alexa will then respond with an audible answer or by performing the user’s command. *Id.* For example, to place an order for orange juice on Amazon.com, a user may say, “Alexa, order more orange juice.” *Id.* ¶ 19. Today, there are more than 40 million Alexa-enabled devices operating within the United States. *Id.* ¶¶ 16, 20.

2. Terms Governing Alexa’s Use

In addition to the Alexa Terms of Use (the “Alexa Terms”), which contain the primary terms and conditions governing Alexa’s use (Declaration of Brian Buckley (Buckley Decl., Dkt. 38), Ex. A), Amazon relies on numerous other policies to set forth terms addressing specific aspects of Alexa and Alexa-enabled devices. Compl. ¶ 35.² Plaintiffs point to the “Alexa and Alexa Device FAQs” (the “Alexa FAQs”) and the Amazon Device Terms of Use (the “Amazon

¹ The facts recited below are taken from Plaintiffs’ Complaint (“Compl.,” Dkt. 1). For the purposes of the present motion, the Court takes the factual allegations in the Complaint as true.

² While Plaintiffs do not identify them all, the Complaint alleges that “Amazon purports to bind Alexa users to terms and conditions in at least 13 separate documents.” Compl. ¶ 35 (emphasis removed).

Device Terms”) as explaining, in part, the features and functionality of Alexa and Alexa-enabled devices. The Alexa FAQs state, in relevant part:

Alexa uses your voice recordings and other information, including from third-party services, to answer your questions, fulfill your requests, and improve your experience and our services. We associate your requests with your Amazon account to allow you to review your voice recordings, access other Amazon services (e.g. so you can ask Alexa to read your Kindle books and play audiobooks from Audible), and to provide you with a more personalized experience.

Id. ¶ 36. Similarly, the Amazon Device Terms explain:

Your Amazon Device may have features that allow you to access Alexa voice services or otherwise use your voice to perform certain tasks, such as check the weather, add a calendar entry, perform a search, or operate other connected products. When you use voice services, we may process your voice input and other information (such as location) in the cloud to respond to your requests and to improve your experience and our products and services.

Id. ¶ 38.

The Alexa Terms expressly incorporate the Amazon.com Privacy Notice (the “Privacy Notice”),³ which describes Amazon’s practices of collecting and using personal information across its services and products. Buckley Decl., Ex. B. That notice, which is discussed in greater detail below, states in its preamble: “We know that you care how information about you is used and shared, and we appreciate your trust that we will do so carefully and sensibly.” Compl. ¶ 113; Buckley Decl., Ex. B at 1. The Privacy Notice also states that Amazon “*use[s] your personal information to display interest-based ads for features, products, and services that might be of interest to you.*” Buckley Decl., Ex. B. at 2 (emphasis added).⁴

³ The Alexa Terms’ preamble states that the Alexa Terms and the Privacy Notice, among other policies, comprise the “Agreement” to which users must agree as a condition to using Alexa. Buckley Decl., Ex. A at 1. That preamble further directs users to review the Privacy Notice before using Alexa. *Id.* (“Before using Alexa, please read ... the [] Privacy Notice ...”).

⁴ Plaintiffs do not object to the Court’s consideration, pursuant to the “incorporation by reference” doctrine, of exhibits submitted by Defendants reflecting Amazon webpages containing full versions of the Alexa Terms and the Privacy Notice. Buckley Decl., Exs. A-B; *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively

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1 **3. Amazon’s Public Statements Concerning its Use of Voice Recordings**
 2 **and Plaintiffs’ Allegations as to Subsequent Revelations**

3 Plaintiffs allege that Amazon, over the course of several years, has consistently denied that
 4 it collects and uses Alexa users’ voice data in order to serve targeted advertisements to them.
 5 Plaintiffs point, specifically, to three separate statements, made by Amazon spokespersons
 6 between 2017 and 2019 in response to media reports about Alexa, that Amazon does “not use
 7 customers’ voice recordings for targeted advertising.” Compl. ¶ 26 (2017 statement to local news
 8 station); *id.* ¶ 27 (2018 statement responding to New York Times article); *id.* ¶ 28 (2019 statement
 9 responding to NBC report). Plaintiffs also point to a 2020 on-air CNBC interview, during which
 10 Amazon’s Senior Vice President of Devices and Services stated, in response to a question about
 11 whether Amazon was using Alexa-generated data for advertising purposes, that Amazon was “not
 12 experimenting with [targeted advertising] yet.” *Id.* ¶ 29.

14 Plaintiffs claim that, contrary to Amazon’s repeated denials, Amazon has been employing
 15 Alexa-captured voice data in its Demand Side Platform (“DSP”), which Plaintiffs allege is a
 16 service Amazon offers to third-party advertisers that “leverage[s] all of the data Amazon collects
 17 about its customers in order to sell targeted advertising ... based on that data.” Compl. ¶¶ 45-50.⁵
 18 Plaintiffs allege that the truth was revealed by a research paper entitled, *Your Echoes are Heard:*
 19 *Tracking, Profiling, and Ad Targeting in the Amazon Smart Speaker Ecosystem* (the “Research
 20 Paper”), that was published in April 2022 by a group of university researchers. *See* Umar Iqbal,
 21 et al., *Your Echos are Heard: Tracking, Profiling, and Ad Targeting in the Amazon Smart Speaker*

24 to the document or the document forms the basis of the plaintiff’s claim.”). Plaintiffs do object, on the other hand, to
 25 the Court’s consideration of an exhibit reflecting a separate Amazon webpage, entitled “Interest-Based Ads,” that
 26 describes Amazon’s practices as to interest-based advertising. *See* Buckley Decl., Ex. C. The Court need not
 determine whether that exhibit may properly be considered given that it is not necessary to grant Defendants’ motion.

⁵ According to Plaintiffs, Amazon, through its DSP, auctions off advertising space – both on Amazon’s platforms and
 on third-party websites – to advertisers through an assortment of ad exchanges. Compl. ¶¶ 50-68.

1 *Ecosystem*, ALEXAECHOS.COM, <https://arxiv.org/pdf/2204.10920.pdf> (rev. May 11, 2022). The
2 researchers conducted a series of experiments in which they exposed different “interest personas”
3 (*i.e.*, simulated persons having unique interests, such as fashion) to Alexa through separate Echo
4 devices, and then observed, among other things, the advertisements displayed to each of them
5 relative to those displayed to simulated “control personas.” *Id.* While the Research Paper does
6 not find any evidence that Amazon is sharing voice recordings or transcripts thereof with
7 advertisers, it concludes that “Amazon processes voice data to infer user interests and uses it to
8 serve targeted ads on-platform (Echo devices) as well as off-platform (web).” *Id.* at 1, 11-12, 16.

10 Following the Research Paper’s publication, Amazon issued a press statement outlining its
11 use of transaction data generated through Alexa for purposes of targeted advertising. Compl. ¶ 32.
12 The statement explained, by way of example:

13 [S]imilar to what you’d experience if you made a purchase on Amazon.com or
14 requested a song through Amazon Music, if you ask Alexa to order paper towels or
15 to play a song on Amazon Music, the record of that purchase or song play may
inform relevant ads shown on Amazon or other sites where Amazon places ads.

16 *Id.* Thus, Defendants’ position is that Amazon uses the records of Alexa users’ transactions to
17 inform advertisements displayed to them, but does not use recordings of Alexa users’ questions or
18 commands – *i.e.*, their “voice recordings” – for that purpose.

20 **B. Procedural Background**

21 Plaintiffs, both of whom own and use Alexa-enabled devices, filed this lawsuit on June 8,
22 2022 as a class action on behalf of “[a]ll persons residing in the United States who are registered
23 users of an Alexa-Enabled Device and have been served targeted advertisements by Amazon
24 through its DSP.” Compl. ¶ 94. On August 12, 2022, Defendants moved to dismiss the Complaint
25 pursuant to Rule 12(b)(6) of the Rules of Federal Procedure. Plaintiffs opposed the motion
26 (Dkt. 41 (Opp.”)), and Defendants replied (Dkt. 43 (“Rep.”)).

1 Washington’s Personality Rights Act, RCW § 63.60.010 *et seq.* Compl. ¶¶ 103-165. The Court
2 will review each claim in turn.

3 **A. Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**

4 “Under Washington law, [t]here is in every contract an implied duty of good faith and fair
5 dealing that obligates the parties to cooperate with each other so that each may obtain the full
6 benefit of performance.” *Rekhter v. State, Dep’t of Soc. & Health Servs.*, 180 Wash. 2d 102, 112-
7 13, 323 (Wn. Sup. Ct. 2014) (citation and quotation marks omitted); *see 134th Street Lofts, LLC*
8 *v. iCap Northwest Opportunity Fund, LLC*, 15 Wash. App. 2d 549, 566 (Wn. Ct. App. 2020) (“The
9 implied duty of good faith and fair dealing protects a party’s justified expectations in entering the
10 agreement.”). That duty, however, does not create “a free-floating duty of good faith unattached
11 to the underlying legal document,” but instead “exists only in relation to performance of a specific
12 contract term.” *Badgett v. Sec. State Bank*, 116 Wash. 2d 563, 570 (Wn. Sup. Ct. 1991). Moreover,
13 the duty cannot “contradict express terms in a contract,” and cannot be used to “interpret[] ...
14 contractual provisions in a manner that expands the scope of their plain meaning.” *134th Street*
15 *Lofts*, 15 Wash. App. 2d at 564-65.
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18 Plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing is
19 premised on the theory that Amazon, by using Alexa-captured voice data to inform targeted
20 advertising – a practice alleged to have been revealed by the Research Paper – breached “both the
21 spirit and letter of the bargain that Alexa users agreed to” through the various policies governing
22 Alexa’s use. Opp. at 8-9; *see* Compl. ¶¶ 116-20. Plaintiffs point, specifically, to two aspects of
23 those policies that, they contend, implied a duty to refrain from the alleged advertising practice.
24 The first is the descriptions of Alexa’s functionality, as set forth in the Alexa FAQs and the
25 Amazon Device Terms (*see supra* at 3), and the second is Amazon’s stated commitment to privacy
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1 in the Privacy Notice’s preamble. *See* Compl. ¶ 113 (“We know that you care how information
2 about you is used and shared, and we appreciate your trust that we will do so carefully and
3 sensibly.”). According to Plaintiffs, those policies’ omission of any reference to advertising, and
4 expressed privacy commitment, conveyed “promises that Amazon only uses Alexa users’ voice
5 data in connection with the execution of Alexa functions.” Compl.
6 ¶ 117. Defendants, in moving to dismiss the claim, argue that the portions of the policies to which
7 Plaintiffs refer do not create a duty on Amazon’s part not to engage in targeted advertising. To
8 the contrary, the Privacy Notice, in fact, disclosed it. Mot. at 5-6.

10 The Court finds that the applicable policies do not create any implied duty on Amazon’s
11 part to refrain from using Alexa-captured voice data to inform targeted advertisements. The
12 Privacy Notice preamble, to start, simply expresses a generic aspiration to use information
13 “carefully and sensibly.” The Alexa FAQs and the Amazon Device Terms, for their part, simply
14 describe Alexa’s general features and functionality, and neither state nor imply that such
15 descriptions set forth an exhaustive list of functions limited to fulfilling users’ requests (*e.g.*,
16 ordering orange juice). *See supra* at 3.⁷ Indeed, those descriptions’ additional (and broad)
17 reference to improving Amazon’s services indicates that fulfilling users’ requests is not the only
18 contemplated use of their voice data. *See* Compl. ¶ 36 (Alexa FAQs stating that “Alexa uses []
19 voice recordings ... to answer [users’] questions, fulfill [users’] requests, *and improve [users’]*
20 *experience and our services.*” (emphasis added)); *id.* ¶ 38 (Amazon Device Terms stating that
21 Amazon “may process [users’] voice input ... to respond to [their] requests *and to improve [their]*
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25 ⁷ Although the Court questions whether the Alexa FAQs is adequately alleged by Plaintiffs to have been binding in
26 the absence of any allegation or explanation as to how it constitutes or becomes a part of a contract, *see, e.g., Mills v.*
Bank of Am., N.A., No. 3:14-cv-05238, 2014 WL 4202465, at *5 (W.D. Wash. Aug. 22, 2014) (rejecting plaintiff’s
“novel claim” that website FAQ was incorporated into contract), the Court assumes that it is given that Defendants do
not dispute it.

1 *experience and [Amazon's] products and services.*" (emphasis added)). Plaintiffs' attempt to read
2 into these policies a specific promise not to use voice data for advertising purposes would, in effect,
3 create a "free-floating duty" untethered to the language of the policies. *See Badgett*, 116 Wash.
4 2d at 570.

5 Moreover, the use of voice data for advertising purposes is contemplated in the applicable
6 policies. The Alexa Terms – which expressly incorporate the Privacy Notice (*see supra* at 3 n.3)
7 – state that Amazon "processes and retains [users'] Alexa Interactions, such as [their] voice
8 inputs," and that Amazon will handle "information about [users'] use of Alexa [and] Alexa
9 Interactions ... in accordance with the [] Privacy Notice." Buckley Decl., Ex. A at 1, 3. The
10 Privacy Notice, in turn, states – in a section entitled, "For What Purposes Does Amazon Use Your
11 Personal Information?" – that Amazon "*use[s] your personal information to display interest-based*
12 *ads for features, products, and services that might be of interest to you.*" Buckley Decl., Ex. B
13 at 2 (emphasis added).⁸ The Privacy Notice makes sufficiently clear that voice data falls within
14 the scope of "personal information." In particular, the first page of that policy explains that the
15 "personal information" collected by Amazon includes "information about [users'] interaction with
16 content and services available through Amazon Services," and a list of "Examples of Information
17 Collected" includes "voice recordings when you speak to Alexa" and information provided "when
18 you ... talk to or otherwise interact[s] with our Alexa Voice service." *Id.*, Ex. B at 1, 5. Defendants
19 deny that Amazon is, in fact, collecting and processing Alexa-captured voice data in order to
20 inform interest-based advertisements. According to Defendants, Amazon only gleans information
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25 ⁸ In a separate section entitled, "What about Advertising?" the Privacy Notice further explains that Amazon
26 "provide[s] ad companies with information that allows them to serve you with more useful and relevant Amazon ads,"
and directs users to a separate Amazon webpage that explains "how to opt-out of interest-based advertising." Buckley
Decl., Ex. B at 3.

1 from Alexa users’ transactions (*e.g.*, records of purchases made or songs played), much the same
2 as any individual’s transactions on a website. However, even assuming the truth of Plaintiffs’
3 allegations that Amazon is using voice data for advertising purposes, that use would be
4 contemplated in – and permitted by – the applicable policies.

5 Plaintiffs argue that the disclosures contained in the Privacy Notice are, regardless of their
6 contents, irrelevant because Plaintiffs were not on notice of the Alexa Terms or the Privacy Notice,
7 and those policies are therefore not binding on them. Opp. at 6-7. Plaintiffs contend that they
8 could not have been on notice of the Privacy Notice, in particular, because it is posted on a webpage
9 separate from where “any user would most obviously expect to find such information,” and is
10 accessible only by hyperlink. Opp. at 6. Plaintiffs’ notice argument lacks merit. The Complaint
11 extensively references the Alexa Terms and the Privacy Notice, and premises Plaintiffs’ claim on
12 Amazon’s alleged breach of the Privacy Notice. *See, e.g.*, Compl. ¶¶ 37, 113. Nowhere do
13 Plaintiffs allege that they did not find these policies or otherwise lacked notice of them. *See, e.g.*,
14 *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888, 944 (N.D. Cal. 2018) (rejecting argument
15 that plaintiffs lacked notice of disclaimer because they “acknowledge[d] the existence of [the]
16 disclaimer and the manner in which it is presented” and “do not otherwise allege that they did not
17 see or understand the disclaimer”).

18 Moreover, Plaintiffs have each registered four Alexa-enabled devices and used them
19 extensively for years. *See* Compl. ¶¶ 84-86, 89-91. Plaintiffs cannot now credibly claim that they
20 were left unable to find the Alexa Terms, the primary policy governing Alexa’s use, or the Privacy
21 Notice as expressly incorporated therein. *See, e.g., Garner v. Amazon.com, Inc.*, No. 21-cv-0750,
22 2022 WL 1443680, at *7 (W.D. Wash. May 6, 2022) (“Plaintiffs apparently activated their [Alexa]
23 devices, thereby indicating consent to the recording of future communications.”); *Wilcosky v.*

1 *Amazon.com, Inc.*, 517 F. Supp. 3d 751, 766 (N.D. Ill. 2021) (plaintiff consented to the Alexa
 2 Terms by registering his Alexa-enabled devices). Contrary to Plaintiffs’ argument that the Privacy
 3 Notice was “obscured” and “segregated” through hyperlinks, the Alexa Terms’ preamble
 4 prominently references and links to the Privacy Notice, and expressly states that it is integral to
 5 the terms governing Alexa’s use. *See supra* at 3 n.3; *see also* Buckley Decl., Ex. A
 6 at 1 (“Before using Alexa, please read these Alexa Terms of Use, including the ... Privacy
 7 Notice”). In sum, given Plaintiffs’ registration and extensive use of their Alexa-enabled devices,
 8 the Alexa Terms’ express and conspicuous incorporation of the Privacy Notice, and the absence
 9 of any allegation that Plaintiffs lacked notice of those policies, Plaintiffs are held to have received
 10 notice of them.⁹

12 Accordingly, the Court finds that Plaintiffs fail to allege adequately that Amazon had an
 13 implied contractual duty to refrain from using Alexa users’ voice data for advertising purposes. In
 14 light of Amazon’s authorization to do so – as set forth in the Alexa Terms, incorporating the
 15 Privacy Notice – any such implied duty would “contradict express terms in a contract.” *134th*
 16 *Street Lofts*, 15 Wash. App. 2d at 564. Therefore, the Court will dismiss Plaintiffs’ claim that
 17 Defendants breached the implied covenant of good faith and fair dealing.
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22 ⁹ Plaintiffs also argue that the versions of the Alexa Terms and the Privacy Notice submitted by Defendants – both of
 23 which were in effect on the date the Complaint was filed – “do not apply to Plaintiffs’ claims because they ... went
 24 into effect long after Plaintiffs first registered their Alexa devices.” Opp. at 5-6. This argument lacks merit. As an
 25 initial matter, Plaintiffs also cite to the versions in effect when the Complaint was filed – *i.e.*, not when they registered
 26 their devices (*see, e.g.*, Compl. ¶ 110 n.21) – and they point to nothing in Defendants’ submitted versions that differs
 from any earlier version. Moreover, the Alexa Terms expressly provide that users’ “continued use of Alexa” after any
 modifications to that agreement “constitutes [their] acceptance of the terms” therein. Buckley Decl., Ex. A at 3. Given
 Plaintiffs’ alleged continued use of Alexa (*see* Compl. ¶¶ 84-86, 89-91), they would not be bound solely by policies
 in effect when they registered their devices. *See Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722, 2020 WL
 2513099, at *6 (N.D. Ill. May 15, 2020) (plaintiff “indicated her acceptance to the modified Terms of Use by
 continuing to use [company’s website] products”).

B. Claim for Violation of Washington’s Consumer Protection Act

Plaintiffs assert a claim under Washington’s Consumer Protection Act (“CPA”), premised on allegations that Amazon has deceived Alexa users into believing that Amazon was using their voice data only for limited purposes, and that those limited purposes did not include advertising. *See, e.g.,* Opp. at 10; Compl. ¶ 126. To prevail on a CPA claim, “the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation.” *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 37 (Wn. Sup. Ct. 2009). Defendants contend that the Complaint’s allegations fail to establish the first and fifth elements. Mot. at 6-11.

1. Whether Rule 9(b) Applies to Plaintiffs’ CPA Claim

Before reviewing whether Plaintiffs adequately allege a CPA violation, the Court addresses the parties’ dispute as to whether the heightened pleading standard applicable to fraud claims, set forth in Rule 9(b) of the Federal Rules of Civil Procedure, applies to Plaintiffs’ claim. *See* Mot. at 7-8; Opp. at 9-10. The Court agrees with Defendants that it does. “While not all claims brought under the Washington CPA must be pled with the specificity prescribed by Rule 9(b), CPA claims that allege and depend upon a ‘unified course of fraudulent conduct’ as the basis of the claims ‘sound in fraud,’ and must be averred with particularity.” *Nemykina v. Old Navy, LLC*, 461 F. Supp. 3d 1054, 1058 (W.D. Wash. 2020) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)). Accordingly, “[f]ederal courts have concluded that Rule 9(b) applies to [CPA] claims alleging that the defendant intentionally misled the public.” *Cole v. Keystone RV Co., LLC*, No. 18-cv-5182, 2018 WL 4051805, at *2 (W.D. Wash. Aug. 24, 2018).

As Plaintiffs explain in their opposition brief, their CPA claim is based on the theory that Amazon “misleadingly represented” and “created a false impression,” through its policies’

disclosures and public statements to the press, that Amazon was “only using Alexa users’ voice data for limited purposes which did not include advertising.” Opp. at 10. As such, Plaintiffs’ claim, which is premised on an alleged scheme to mislead the public through various channels, “depend[s] upon a ‘unified course of fraudulent conduct’ as the basis of the claim[,]” and therefore must be pled consistent with Rule 9(b)’s heightened pleading standard. *See Nemykina*, 461 F. Supp. 3d at 1058. Accordingly, for Plaintiffs’ CPA claim to survive Defendants’ motion, the Complaint “must state with particularity the circumstances” constituting the unfair or deceptive practice. Fed. R. Civ. P. 9(b); *see Hernandez v. Johnson & Johnson*, No. 4:20-cv-05136, 2021 WL 320612, at *5 (E.D. Wash. Jan. 8, 2021) (noting that, applying Rule 9(b), plaintiff’s CPA claim “must be accompanied by the who, what, when, where, and how of the misconduct charged.” (quoting *Vess*, 317 F.3d at 1106)).

2. Whether Plaintiffs Plead an Unfair or Deceptive Practice

In order to establish a “deceptive” act or practice, the plaintiff must show that the defendant’s act or practice “had the capacity to deceive a substantial portion of the public.” *Panag*, 166 Wash. 2d at 47, 50 (“Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer” (citation and quotation marks omitted)). It is possible that an act or practice is “unfair without being deceptive.” *Klem v. Washington Mut. Bank*, 176 Wash. 2d 771, 786 (Wn. Sup. Ct. 2013). To prevail on such a theory, the plaintiff must establish that the act or practice “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits [to consumers or to competition].” *Alpert v. Nationstar Mortg. LLC*, No. 15-cv-1164, 2019 WL 1200541, at *6 (W.D. Wash. Mar. 14, 2019) (quoting *Klem*, 176 Wash. 2d at 786).

1 Plaintiffs do not adequately allege that Amazon engaged in an unfair or deceptive practice
2 through its policies' disclosures. As discussed above, the applicable policies do not conceal
3 Amazon's use of Alexa-captured voice data for advertising purposes, but instead contemplate that
4 very practice. *See supra* at 8-10. The Court finds that Amazon's disclosures are not "likely to
5 mislead a reasonable consumer" in the manner alleged by Plaintiffs, and therefore are not
6 deceptive. *See Panag*, 166 Wash. 2d at 50; *see also Minnick v. Clearwire US, LLC*, 683 F. Supp.
7 2d 1179, 1186 (W.D. Wash. 2010) ("Where there is no factual dispute as to what each party did,
8 whether the conduct constitutes an unfair or deceptive act can be decided ... as a question of law."
9 (citation and quotation marks omitted)). The Court also finds that Amazon's disclosures are not
10 "unfair" insofar as consumers could "reasonably avoid" the injury Plaintiffs allege resulted from
11 those disclosures.¹⁰ *See Alpert*, 2019 WL 1200541, at *6. "An injury is reasonably avoidable if
12 consumers have reason to anticipate the impending harm and the means to avoid it, or if consumers
13 are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the
14 injury after the fact." *Hong v. Bank of Am., N.A.*, No. 20-cv-1667, 2021 WL 3207684, at *6 (W.D.
15 Wash. July 29, 2021) (citations and quotation marks omitted), *aff'd*, 2022 WL 2235469 (9th Cir.
16 June 22, 2022). In light of Amazon's disclosures, consumers would have "reason to anticipate"
17 their injury and "the means to avoid it" – *i.e.*, by reviewing the Alexa Terms and declining to
18 purchase and use an Alexa-enabled device.¹¹
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24 ¹⁰ Plaintiffs allege they were injured by paying more for Alexa-enabled devices than they otherwise would have had
25 Amazon's practices been disclosed, and "by having their voice data and the inferences gleaned from that data" used
26 for advertising purposes. Compl. ¶ 130.

¹¹ Defendants argue that Plaintiffs also could have avoided their alleged injury by opting out of interest-based
advertising. *See Buckley Decl.*, Ex. B at 3 (Privacy Notice directing users "how to opt-out of interest-based
advertising"). The Court, however, agrees with Plaintiffs that this argument is inappropriate at this juncture in the
absence of any allegations bearing on that opt-out procedure.

1 As noted above, Plaintiffs also contend that the statements Amazon’s spokespersons made
2 to the press between 2017 and 2020 (*see supra* at 4) were deceptive, as allegedly revealed by the
3 Research Paper’s findings. Whether or not those statements were deceptive is not a matter the
4 Court need address because Plaintiffs fail to plead that the statements caused their alleged injuries.
5 *See infra*.

6 **3. Whether Plaintiffs Plead Causation**

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8 “[T]o establish causation the plaintiff must ‘establish that but for the defendant’s unfair or
9 deceptive act or practice the plaintiff’s injury would not have occurred’ as a matter of fact.” *Young*
10 *v. Toyota Motor Sales, U.S.A.*, 196 Wash. 2d 310, 322 (Wn. Sup. Ct. 2020) (quoting *Indoor*
11 *Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash. 2d 59, 82 (Wn.
12 Sup. Ct. 2007)). Defendants contend that Plaintiffs cannot establish causation in the absence of
13 any allegation that they viewed or heard any of Amazon’s allegedly misleading statements.

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15 As discussed above, Plaintiffs may not premise a CPA claim on the disclosures contained
16 in Amazon’s policies. With respect to Amazon’s public statements to the press, the Court agrees
17 with Defendants that Plaintiffs fail to establish causation. In particular, the Complaint contains no
18 allegations that Plaintiffs viewed or heard any of those statements or were otherwise aware of them
19 at the time they purchased their Alexa-enabled devices or at any time prior to the filing of this
20 lawsuit. Absent such allegations, Plaintiffs cannot establish that, but for Amazon’s public
21 statements, their injuries would not have occurred. *See, e.g., Maple v. Costco Wholesale Corp.*,
22 649 F. App’x 570, 572 (9th Cir. 2016) (plaintiff failed to establish causation because he did “not
23 allege[] that he read those parts of the label” that he claimed were deceptive); *Woodell v. Expedia*
24 *Inc.*, No. 19-cv-0051, 2019 WL 3287896, at *11 (W.D. Wash. July 22, 2019) (plaintiff failed to
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1 establish causation where she did “not allege that she read or even noticed” mislabeled booking
2 charge alleged to have constituted the deceptive practice).

3 Accordingly, the Court will dismiss Plaintiffs’ CPA claim.

4 **C. Claim for Intrusion upon Seclusion**

5 Plaintiffs assert a claim for intrusion upon seclusion, premised on allegations that Amazon
6 collected Plaintiffs’ voice data through their Alexa use and, without Plaintiffs’ consent, utilized
7 that data for advertising purposes. *See* Compl. ¶¶ 137-53. The “intrusion upon seclusion” cause
8 of action – a species of invasion of privacy claims recognized under Washington common law –
9 is based on the theory that “[o]ne who intentionally intrudes, physically or otherwise, upon the
10 solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other
11 for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”
12 *Buckley v. Santander Consumer USA, Inc.*, No. 17-cv-5813, 2018 WL 1532671, at *7 (W.D. Wash.
13 Mar. 29, 2018) (quoting *Mark v. Seattle Times*, 96 Wash. 2d 473, 497 (Wn. Sup. Ct. 1981)). To
14 prevail on such a claim, a plaintiff must establish the following elements:
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- 17 1. An *intentional* intrusion, physically or otherwise, upon the solitude or seclusion
- 18 of plaintiff, or his private affairs;
- 19 2. With respect to the matter or affair which plaintiff claims was invaded, that
- 20 plaintiff had a legitimate and reasonable expectation of privacy;
- 21 3. The intrusion would be highly offensive to a reasonable person; and
- 22 4. That the defendant’s conduct was a proximate cause of damage to plaintiff.

23 *Id.* (citation omitted) (emphasis added).

24 Defendants argue that Plaintiffs fail to plead the first and third elements. Mot. at 11-13.
25 With respect to the first element, which relates in part to the requisite intent, “[a]n actor commits
26 an intentional intrusion only if he believes, or is substantially certain, that he lacks the necessary
legal or personal permission to commit the intrusive act.” *Poore-Rando v. United States*, No. 16-

1 cv-5094, 2017 WL 5756871, at *2 (W.D. Wash. Nov. 28, 2017) (*O'Donnell v. United States*, 891
2 F.2d 1079, 1083 (3d Cir. 1989)). By the same token, a person's consent to the allegedly intrusive
3 act "negates the element of intentional intrusion upon the plaintiff's private affairs." *Budsberg v.*
4 *Trause*, 191 Wash. App. 1021 (2015).

5 Plaintiffs' allegations are made against the backdrop of the terms of the policies to which
6 they assented. While Plaintiffs correctly point out that "[i]ndividuals 'have a reasonable
7 expectation of privacy where data is collected without their consent'" (Opp. at 13 (quoting *In re*
8 *Google Location Hist. Litig.*, 514 F. Supp. 3d 1147, 1156-57 (N.D. Cal. 2021))), Plaintiffs' alleged
9 circumstances demonstrate their consent. Plaintiffs allege that they are "registered user[s] of Alexa
10 products." Compl. ¶¶ 84, 89. By using their Alexa devices, Plaintiffs consented to the Alexa
11 Terms. See Buckley Decl., Ex. A at 1 (Alexa Terms stating: "By using Alexa, you agree to the
12 terms of this Agreement on behalf of yourself and all other persons who use Alexa under your
13 account.")). As discussed above, Plaintiffs were on notice of the Alexa Terms and the Privacy
14 Notice incorporated therein. See *supra* at 10-11. Given that those policies permit the collection
15 and processing of voice data for advertising purposes, Plaintiffs' use of their Alexa devices granted
16 Amazon consent to do so. Accordingly, Plaintiffs fail to show that Amazon "lack[ed] the
17 necessary legal or personal permission" to commit the allegedly intrusive acts, and therefore
18 Amazon's acts were not intentional. See *Poore-Rando*, 2017 WL 5756871, at *2.¹²

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22 The Court will dismiss Plaintiffs' intrusion upon seclusion claim.
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¹² Given the Court's finding that Plaintiffs fail to establish the "intentional intrusion" element of the claim, the Court need not review whether the Complaint adequately alleges the "highly offensive" element.

D. Claim for Violation of Washington’s Personality Rights Act

Plaintiffs claim that Defendants violated Washington’s Personality Rights Act (“PRA”) by collecting and using their voices, without their consent, for advertising purposes. Compl. ¶¶ 154-65. Under the PRA, “[e]very individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness.” RCW § 63.60.010. A claim for infringement under the PRA arises when:

[a]ny person ... uses or authorizes the use of a living or deceased individual’s or personality’s name, voice, signature, photograph, or likeness, on or in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations, or if any person disseminates or publishes such advertisements in this state, without written or oral, express or implied consent of the owner of the right.

RCW § 63.60.050.

The Court finds that Plaintiffs fail to allege a PRA violation. Plaintiffs do not allege that their voices were ever incorporated or otherwise used “on or in goods, merchandise, or products,” or in advertisements for any “products, merchandise, goods, or services” that were targeted at them (or at anyone else). Rather, they allege that their voices were simply being leveraged by Amazon’s DSP in order to enable third-party advertisers to optimize their advertising placements – *i.e.*, of advertisements not alleged to contain Plaintiffs’ voices. *See supra* at 4, n.5. As such, Plaintiffs’ allegations do not fit within the scope of the PRA.¹³

Accordingly, the Court will dismiss Plaintiffs’ claim for violation of the PRA.

¹³ Defendants argue that Plaintiffs’ claim is barred by RCW § 63.60.070(3), which disallows plaintiffs from pursuing PRA claims as a class action. *See* RCW § 63.60.070(3) (“the individuals or personalities complaining of the use shall not bring their cause of action as a class action”). Plaintiffs respond – and Defendants dispute – that, under the Supreme Court’s decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), such class action bars are unenforceable in diversity cases like this action. Given that Plaintiffs’ PRA claim fails on the merits, the Court need not reach this issue.

For the foregoing reasons, Defendants' motion to dismiss (Dkt. 37) is GRANTED. The Court hereby DISMISSES the Complaint without prejudice.

Dated: January 26, 2022

Barbara Jacobs Rothstein
U.S. District Court Judge